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IN THE

Supreme Court of the United States

October Term, 1986

WADE POWELL AND FREDA POWELL, HIS WIFE,
AND ERWIN WHITE AND SUSAN WHITE, HIS WIFE,
Petitioners,

v.

STATE OF FLORIDA, MUNROE REGIONAL MEDICAL CENTER,
WILLIAM H. SHUTZE, M.D., KEITH GAUGER, THOMAS M. TECHMAN,
NORTH FLORIDA LIONS EYE BANK, INC.,
THE MEDICAL EYE BANK, INC., FLORIDA LIONS EYE BANK, INC.,
FLORIDA SOCIETY OF OPHTHALMOLOGY, INC.,
METROPOLITAN DADE COUNTY
AND THE FLORIDA MEDICAL ASSOCIATION,
Respondents.

PETITIONERS' REPLY

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This Court should grant certiorari because of the great importance of the issues presented in this case. Respondents themselves argue that the challenged statutory scheme has great social importance by noting that, since the adoption of the statute, there has been a seven fold increase in corneal transplants. Eye Banks brief at 2. Because of this impact on transplan-

tation, other states have been adopting similar statutes. See Appendix to Petition for Certiorari at 82-102. Such statutes also have a great impact on the thousands of families whose decedents' corneas are being taken for transplantation without their consent. Thus, the challenged statute has a significant impact, and its constitutionality is a matter of great importance.

It appears that the thrust of respondents' argument is that no substantial federal question exists. This is incorrect. Important constitutional questions are presented here. This case is not, as respondents would characterize it, a state law case. Respondents' focus on tort and property case law which developed to assure the proper burial of the dead is inappropriate. This case law does not control here because this case

involves more than tortious interference with burial; it involves a state sanctioned scheme to harvest the bodies of the dead without the consent of the decedent or the next of kin. When the state case law discussed by respondents developed, burial of the corpse, or disposal by some other means, were the only responses to death. Technology has made another alternative available: the transplantation of tissues and organs from the dead to the living. Those early cases did not, and could not, have contemplated this development, and those cases cannot give guidance here.

The state's approach -- that this case should be decided through the mechanical application of traditional doctrine relating to the burial of the dead -- has already created problems. Relying on that case law, the state

contends here that petitioners have "no cognizable property interest in the remains of their decedents such as would entitle them to constitutional protection." State's brief at 7. [1] However, the state recently charged five individuals with grand theft in the second degree for involvement in a scheme to sell corneas for profit outside the United States. The state is contending

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[1] It is not clear whether the State's argument is based upon its position that a cornea is not "property," or that it is property, but not the property of petitioners. It is hard to see how a child, which is literally the flesh of the parents, could "belong" to anyone but the parents at death. Therefore, the argument appears to be that the cornea is not property. The court below was similarly unclear on this point, Appendix to Petition for Certiorari at A. 18-22. However, one authority quoted by the court stated, "there is no property in a dead body in a commercial or material sense," Appendix to Petition for Certiorari at A. 22, which implies that the court below was of the opinion that corneas were not property.

that corneas are valuable property in that prosecution. [2] The position that corneal tissue taken from decedents' families without their consent is not

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[2] State of Florida v. Robert Smith Grant, et al., Case #87-4613, Circuit Court for the 13th Judicial Circuit in and for Hillsborough County, Florida. Prosecutors alleged that the defendants intercepted corneas intended for a Tampa tissue bank and sold them in Saudi Arabia, Argentina, and other unspecified countries. Each of the five defendants who were charged with second degree grand theft in a 22 count information face possible sentences of 236 years in jail and fines of $236,000. See "6 Charged in Cornea Scheme," The Miami Herald, April 16, 1987 at 26 A; "6 Charged in Sales of Corneas," Ocala Star Banner, April 16, 1987 at 3B. An essential element of the charge of grand theft in the second degree is the taking of property of a value of more than $100 and less than $20,000. Section 812.014(2) (b)1., Florida Statutes. These allegations are in stark contrast to the state's position in these proceedings that, "there is no fair market value for corneal tissue," and, "there does not seem to be any reasonable basis for calculating the fair market value of corneal tissue." State's brief at 12.

property until after it is on the way to the tissue bank defies logic. A more consistent position would be that human tissue is property, and may only be removed from decedents consistent with the requirements of due process of law. The state's failure to develop a consistent position on this matter will continue to create problems for regulation in this area.

The absence of careful analysis which created the state's present dilemma is not uncharacteristic of the jurisprudence in this area. Of the three cases which have decided challenges to cornea removal statutes, [3] only the

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[3] Tillman v. Detroit Receiving Hospital, 138 Mich. App. 683, 360 N.W. 2d 275 (1984), appeal denied, No. 75442 (Mich. June 3, 1985). (Appendix to Eye Bank brief at A. 7.); Georgia Lions Eye Bank, Inc. v. Lavant, 255 Ga. 60, 335 S.E. 2d 127, 1 (1985), cert. denied ____ U.S. _____, 106 S.Ct. 1464, 89 L.Ed.2d

decision below attempted serious consideration of the constitutional issues presented. This Court should not await further decisions before it acts. The trend which is developing clearly demonstrates a need for guidance from this Court. This Court should act to guarantee that regulation in this important area will develop in a consistent and constitutional manner.

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721 (1986). (Appendix to Shutze brief at A. 19); State of Florida v. Powell, 497 So.2d 1188 (Fla. 1986). (Appendix to Petition for Certiorari at A.-1.)